

AMENDED IN ASSEMBLY MARCH 25, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 572

Introduced by Assembly Member Yee

February 18, 2003

An act to amend Sections ~~98.6~~, 98.7, 6310, and 6312 of, and to repeal and add Section 6311 of, the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 572, as amended, Yee. Employment.

Under existing law, it is unlawful to discriminate against an employee for filing a complaint as to an unlawful employment practice.

~~This bill would provide that if an employee is discharged or otherwise discriminated against within 90 days of filing a complaint, there is a rebuttable presumption that the action was retaliatory.~~

~~Under existing law, and~~ the Labor Commissioner is required to investigate complaints of unlawful employment practices.

This bill would provide standards and establish time limits for the Labor Commissioner's investigation and decision.

Under existing law, if an employer does not comply with an order of the Labor Commissioner, the Labor Commissioner may petition a court for relief.

This bill would allow the complainant to prosecute the matter on behalf of the Labor Commissioner.

Under existing law, if an employee is unlawfully required and refuses to perform unsafe work, the employee is entitled to reinstatement and reimbursement for lost wages.

This bill would also allow the employee to recover a penalty, as well as reasonable attorney's fees and costs.

Under existing law, an employer who refuses to comply with an order of the Labor Commissioner is guilty of a misdemeanor.

This bill would make the misdemeanor punishable by a fine or imprisonment, or both, and would also make it a misdemeanor for an employer to knowingly conceal an unsafe working condition, if an employee causes death or serious injury, thereby imposing a state-mandated local program.

Under existing law, any employee who believes that he or she has been discharged or otherwise discriminated against may file a complaint with the Labor Commissioner.

This bill additionally would permit the aggrieved employee to pursue a civil action in a court of competent jurisdiction. The bill also would establish within the Division of Labor Standards Enforcement a unit or personnel designated solely to handle matters related to the protection of employees' rights to secure, safe, and healthful working conditions, and to assure effective and enforceable rights in the event of reprisal for involvement with occupational health and safety issues. The division would be required annually to file a report with the Legislature setting forth certain statistical information relating to employee safety and health and information concerning employee grievances.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. It is the intent of the Legislature that employees
2 in this state have effective and enforceable rights to secure safe and
3 healthful working conditions, and to this end, be protected against
4 reprisals for complaints about hazardous conditions and refusals
5 to work in hazardous conditions. The following enumeration of
6 rights and remedies shall be available and rigorously enforced.

7 ~~SEC. 2. Section 98.6 of the Labor Code is amended to read:~~

1 ~~98.6.—(a) (1) No person shall discharge an employee or in~~
2 ~~any manner discriminate against any employee or applicant for~~
3 ~~employment because the employee or applicant engaged in any~~
4 ~~conduct delineated in this chapter, including the conduct described~~
5 ~~in subdivision (k) of Section 96, and Chapter 5 of Part 3 of Division~~
6 ~~2, or because the employee or applicant for employment has filed~~
7 ~~a bona fide complaint or claim or instituted or caused to be~~
8 ~~instituted any proceeding under or relating to his or her rights,~~
9 ~~which are under the jurisdiction of the Labor Commissioner, or has~~
10 ~~testified or is about to testify in any proceeding or because of the~~
11 ~~exercise by the employee or applicant for employment on behalf~~
12 ~~of himself, herself, or others of any rights afforded him or her.~~

13 ~~(2) Except in the circumstances of a normal seasonal layoff or~~
14 ~~a general reduction in force affecting a majority of employees, if~~
15 ~~a person discharges an employee or demotes, suspends, or reduces~~
16 ~~the hours of work or pay of an employee within 90 days after the~~
17 ~~employee has exercised any of the rights enumerated in this code,~~
18 ~~there is a rebuttable presumption affecting the burden of proof that~~
19 ~~the person's action was retaliatory and in violation of this section.~~
20 ~~The burden of proof under this subdivision shall be preponderance~~
21 ~~of the evidence.~~

22 ~~(b) Any employee who is discharged, threatened with~~
23 ~~discharge, demoted, suspended, or in any other manner~~
24 ~~discriminated against in the terms and conditions of his or her~~
25 ~~employment because the employee engaged in any conduct~~
26 ~~delineated in this chapter, including the conduct described in~~
27 ~~subdivision (k) of Section 96, and Chapter 5 of Part 3 of Division~~
28 ~~2, or because the employee has made a bona fide complaint or~~
29 ~~claim to the division pursuant to this part shall be entitled to~~
30 ~~reinstatement and reimbursement for lost wages and work benefits~~
31 ~~caused by acts of the employer. Any employer who willfully~~
32 ~~refuses to hire, promote, or otherwise restore an employee or~~
33 ~~former employee who has been determined to be eligible for such~~
34 ~~rehiring or promotion by a grievance procedure, arbitration or~~
35 ~~hearing authorized by law, is guilty of a misdemeanor.~~

36 ~~(c) (1) Any applicant for employment who is refused~~
37 ~~employment, who is not selected for a training program leading to~~
38 ~~employment, or who in any other manner is discriminated against~~
39 ~~in the terms and conditions of any offer of employment because the~~
40 ~~applicant engaged in any conduct delineated in this chapter,~~

1 including the conduct described in subdivision (k) of Section 96,
2 and Chapter 5 of Part 3 of Division 2, or because the applicant has
3 made a bona fide complaint or claim to the division pursuant to this
4 part shall be entitled to employment and reimbursement for lost
5 wages and work benefits caused by the acts of the prospective
6 employer.

7 ~~(2) This subdivision shall not be construed to invalidate any~~
8 ~~collective bargaining agreement that requires an applicant for a~~
9 ~~position that is subject to the collective bargaining agreement to~~
10 ~~sign a contract that protects either or both of the following as~~
11 ~~specified in paragraphs (A) and (B), nor shall this subdivision be~~
12 ~~construed to invalidate any employer requirement of an applicant~~
13 ~~for a position that is not subject to a collective bargaining~~
14 ~~agreement to sign an employment contract that protects either or~~
15 ~~both of the following as specified in paragraphs (A) and (B):~~

16 ~~(A) An employer against any conduct that is actually in direct~~
17 ~~conflict with the essential enterprise-related interests of the~~
18 ~~employer and where breach of that contract would actually~~
19 ~~constitute a material and substantial disruption of the employer's~~
20 ~~operation.~~

21 ~~(B) A firefighter against any disease that is presumed to arise~~
22 ~~in the course and scope of employment, by limiting his or her~~
23 ~~consumption of tobacco products on and off the job.~~

24 ~~(d) The provisions of this section creating new actions or~~
25 ~~remedies that are effective on January 1, 2002, to employees or~~
26 ~~applicants for employment do not apply to any state or local law~~
27 ~~enforcement agency, any religious association or corporation~~
28 ~~specified in subdivision (d) of Section 12926 of the Government~~
29 ~~Code, except as provided in Section 12926.2 of the Government~~
30 ~~Code, or any person described in Section 1070 of the Evidence~~
31 ~~Code.~~

32 ~~(e) Nothing in this section shall be construed to give the Labor~~
33 ~~Commissioner concurrent jurisdiction with the Workers'~~
34 ~~Compensation Appeals Board with regard to discrimination~~
35 ~~complaints.~~

36 ~~SEC. 3.—~~

37 *SEC. 2.* Section 98.7 of the Labor Code is amended to read:

38 98.7. (a) Any person who believes that he or she has been
39 discharged or otherwise discriminated against in violation of any
40 law under the jurisdiction of the Labor Commissioner may file a

1 complaint with the division within six months after the occurrence
2 of the violation. The six-month period may be extended for good
3 cause. The complaint shall be investigated by a discrimination
4 complaint investigator in accordance with this section. The Labor
5 Commissioner shall establish procedures for the investigation of
6 discrimination complaints. A summary of the procedures shall be
7 provided to each complainant and respondent at the time of initial
8 contact. The Labor Commissioner shall inform complainants
9 charging a violation of Section 6310 or 6311, at the time of initial
10 contact, of his or her right to file a separate, concurrent complaint
11 with the United States Department of Labor within 30 days after
12 the occurrence of the violation.

13 (b) Each complaint of unlawful discharge or discrimination
14 shall be assigned to a discrimination complaint investigator who
15 shall prepare and submit a report to the Labor Commissioner based
16 on an investigation of the complaint. The Labor Commissioner
17 may designate the chief deputy or assistant Labor Commissioner
18 or the chief counsel to receive and review the reports.

19 (1) The division shall commence an investigation within 10
20 days of the date that a complaint is received by the division. The
21 division shall provide written notice of the commencement of the
22 investigation to the complainant and respondent upon
23 commencing the investigation.

24 (A) The written notice of commencement shall inform the
25 complainant and respondent of their rights and responsibilities and
26 of all procedures involved in resolving the complaint.

27 (B) The written notice shall order that the respondent shall,
28 without awaiting a discovery request, provide to the complainant
29 and the division all of the following:

30 (i) The name, and, if known, the address and telephone number
31 of each individual likely to have discoverable information that the
32 respondent may use to support its defenses, unless solely for
33 impeachment, identifying the subject of the information.

34 (ii) A copy, or a description by category and location, of all
35 documents, data compilations, and tangible things that are in the
36 possession, custody, or control of the respondent that the
37 respondent may use to support its defenses, unless solely for
38 impeachment.

39 (iii) The employee's personnel file.

1 (C) If the complaint does not provide enough information to
2 commence an investigation, the division shall so notify the
3 complainant of that fact within 10 days, and shall instruct the
4 complainant regarding what additional specific information is
5 needed to commence the investigation.

6 (2) The division shall issue subpoenas, upon showing of good
7 cause, for additional evidence in any form or to compel testimony
8 from a witness.

9 (3) The investigation shall be conducted by an inspector,
10 investigator, or attorney designated by the division, who shall
11 obtain and consider, at a minimum, the following information:

12 (A) Written statements and transcripts of oral statements
13 submitted by the complainant in response to questioning by the
14 division, which shall include all the elements of a prima facie case.

15 (B) Written statements submitted by the respondent.

16 (C) Written statements or transcripts of oral statements
17 submitted by the complainant in response to questioning by the
18 division, which shall include questioning the complainant
19 regarding evidence that might tend to rebut statements offered by
20 the respondent.

21 (D) Documents subpoenaed from the respondent or any other
22 relevant source to support or rebut the evidence of the complainant
23 or the respondent.

24 (E) Written statements or transcripts of oral statements given
25 by witnesses who have information concerning the alleged
26 violation. The identity of a witness shall remain confidential
27 unless the identification of the witness becomes necessary to
28 proceed with the investigation or to prosecute an action to enforce
29 a determination.

30 (4) The person conducting the investigation shall, within 30
31 days of the date that a complaint for which an investigation was
32 commenced is received by the division, file a written investigation
33 report summarizing the findings of the investigation and all the
34 information obtained pursuant to subparagraphs (1) to (3),
35 inclusive. The investigation report submitted to the Labor
36 Commissioner or designee shall include the statements and
37 documents obtained in the investigation, and the findings of the
38 investigator concerning whether a violation occurred.

39 (5) The Labor Commissioner may hold an investigative
40 hearing whenever the Labor Commissioner determines, after

1 review of the investigation report, that a hearing is necessary to
2 fully establish the facts. In the hearing the investigation report
3 shall be made a part of the record and the complainant and
4 respondent shall have the opportunity to present further evidence.
5 If a hearing is conducted, the complainant and the respondent have
6 the right to be present, to present evidence, and to present and
7 cross-examine witnesses. The complainant and the respondent
8 have the right to cross-examine witnesses presented by the
9 division. The division may issue, serve, and enforce subpoenas on
10 behalf of the division, the complainant, or the respondent to
11 compel the attendance of witnesses at the hearing.

12 (6) The division shall issue a decision including findings of fact
13 and conclusions of law within 50 days of the date that a complaint
14 for which an investigation was commenced is received by the
15 division.

16 (c) If the Labor Commissioner determines a violation has
17 occurred, he or she shall notify the complainant and respondent of
18 the decision within 10 days of the time the decision is issued and
19 direct the respondent to cease and desist from the violation and
20 take any action deemed necessary to remedy the violation,
21 including, but not limited to, where appropriate, rehiring or
22 reinstatement, reimbursement of lost wages and interest thereon,
23 payment of reasonable attorney's fees associated with any hearing
24 held by the Labor Commissioner in investigating the complaint,
25 the posting of notices to employees, and specific penalties set forth
26 in subdivision (b) of Section 6310 for matters charging a violation
27 of Section 6310 or 6311.

28 (1) If the respondent does not comply with the order within 10
29 working days following notification of the Labor Commissioner's
30 determination, the Labor Commissioner shall bring an action
31 promptly against the respondent in a court of competent
32 jurisdiction. The Labor Commissioner shall petition the court for
33 appropriate temporary relief or restraining order unless he or she
34 determines good cause exists for not doing so.

35 (2) If the Labor Commissioner fails to bring an action in court
36 promptly, the complainant may bring an action against the Labor
37 Commissioner in any appropriate court for a writ of mandate to
38 compel the Labor Commissioner to bring an action in court against
39 the respondent, or the complainant may prosecute the matter on
40 behalf of the Labor Commissioner. If the complainant prevails in

1 his or her action for a writ or in a direct prosecution of the Labor
2 Commissioner's order, the court shall award the complainant court
3 costs and reasonable attorney's fees, notwithstanding any other
4 law. Regardless of any delay in bringing an action in court, the
5 Labor Commissioner shall not be divested of jurisdiction. In any
6 action, the court may permit the claimant to intervene as a party
7 plaintiff to the action and shall have jurisdiction, for cause shown,
8 to restrain the violation and to order all appropriate relief.
9 Appropriate relief includes, but is not limited to, rehiring or
10 reinstatement of the complainant, reimbursement of lost wages
11 and interest thereon, specific penalties set forth in subdivision (b)
12 of Section 6310 for matters charging a violation of Section 6310
13 or 6311, and any other compensation or equitable relief as is
14 appropriate under the circumstances of the case.

15 (d) (1) If the Labor Commissioner determines no violation has
16 occurred, he or she shall notify the complainant and respondent of
17 the decision within 10 days of the time the decision is issued and
18 shall dismiss the complaint.

19 (2) The Labor Commissioner may direct the complainant to
20 pay reasonable attorney's fees associated with any hearing held by
21 the Labor Commissioner if the Labor Commissioner finds the
22 complaint was frivolous, unreasonable, groundless, and was
23 brought in bad faith.

24 (3) The complainant may, after notification of the Labor
25 Commissioner's determination to dismiss a complaint, bring an
26 action in an appropriate court, which shall have jurisdiction to
27 determine whether a violation occurred, and if so, to restrain the
28 violation and order all appropriate relief to remedy the violation.
29 Appropriate relief includes, but is not limited to, rehiring or
30 reinstatement of the complainant, reimbursement of lost wages
31 and interest thereon, specific penalties set forth in subdivision (b)
32 of Section 6310 for matters charging a violation of Section 6310
33 or 6311, and other compensation or equitable relief as is
34 appropriate under the circumstances of the case.

35 (4) When dismissing a complaint, the Labor Commissioner
36 shall advise the complainant of his or her right to bring an action
37 in an appropriate court if he or she disagrees with the
38 determination of the Labor Commissioner, and in the case of an
39 alleged violation of Section 6310 or 6311, to file a complaint



1 against the state program with the United States Department of
2 Labor.

3 (5) The filing of a timely complaint against the state program
4 with the United States Department of Labor shall stay the Labor
5 Commissioner's dismissal of the division complaint until the
6 United States Secretary of Labor makes a determination regarding
7 the alleged violation. Within 15 days of receipt of that
8 determination, the Labor Commissioner shall notify the parties
9 whether he or she will reopen the complaint filed with the division
10 or whether he or she will reaffirm the dismissal.

11 (e) The Labor Commissioner shall notify the complainant and
12 respondent of his or her determination under subdivision (c) or
13 paragraph (1) of subdivision (d), not later than 60 days after the
14 filing of the complaint. Determinations by the Labor
15 Commissioner under subdivision (c) or (d) may be appealed by the
16 complainant or respondent to the Director of Industrial Relations
17 within 10 days following notification of the Labor
18 Commissioner's determination. The appeal shall set forth
19 specifically and in full detail the grounds upon which the appealing
20 party considers the Labor Commissioner's determination to be
21 unjust or unlawful, and every issue to be considered by the
22 director. The director may consider any issue relating to the initial
23 determination and may modify, affirm, or reverse the Labor
24 Commissioner's determination. The director's determination shall
25 be the determination of the Labor Commissioner. The director
26 shall notify the complainant and respondent of his or her
27 determination within 10 days of receipt of the appeal.

28 (f) The rights and remedies provided by this section do not
29 preclude an employee from pursuing any other rights and remedies
30 under any other law.

31 ~~SEC. 4.—~~

32 *SEC. 3.* Section 6310 of the Labor Code is amended to read:

33 6310. (a) It is an unlawful employment practice for an
34 employer to subject an employee to an adverse employment action
35 because any of the following has occurred:

36 (1) The employee filed, caused to be filed, or made known his
37 or her intention to file, any oral or written complaint to the
38 division, other governmental agencies having statutory
39 responsibility for or assisting the division with reference to

1 employee safety or health, his or her employer or any agent of his
2 or her employer, or his or her representative.

3 (2) The employee instituted or caused to be instituted any
4 proceeding under or relating to his or her rights or has testified or
5 is about to testify in the proceeding or because of the exercise by
6 the employee on behalf of himself, herself, or others of any rights
7 afforded him or her pursuant to Division 5 (commencing with
8 Section 6300).

9 (3) The employee participated in an occupational health and
10 safety committee.

11 (4) The employee refused to perform unsafe work, as defined
12 in subdivision (d).

13 (b) An employer who violates subdivision (a) is liable for the
14 following:

15 (1) Twenty-five thousand dollars (\$25,000) or three times the
16 value of the employee's lost benefits and wages, whichever is
17 greater.

18 (2) Other pecuniary losses caused by the violation of
19 subdivision (a).

20 (3) Reinstatement.

21 (4) Reasonable attorney's fees and costs.

22 (c) For purposes of this section, "adverse employment action"
23 means a discharge, demotion, or suspension of an employee, or an
24 action that threatens to discharge or in any other manner
25 discriminates against an employee in a term or condition of
26 employment.

27 (d) For purposes of this section, "refused to perform unsafe
28 work" means a refusal to perform work under all of the following
29 conditions:

30 (1) The employee complained in good faith about working
31 conditions or practices which he or she reasonably believed to be
32 unsafe or dangerous, created a real and apparent hazard, or was
33 likely to cause death or serious physical harm to the employee, his
34 or her fellow employees, or the employees of another employer.

35 (2) As soon as practicable, and immediately upon request, the
36 employee reported his or her refusal and reasons to his or her
37 immediate supervisor, foreperson, or any person in authority.

38 (3) The employee performed alternative work if requested by
39 the employer.

40 ~~SEC. 5.—~~

1 *SEC. 4.* Section 6311 of the Labor Code is repealed.

2 ~~*SEC. 6.*~~

3 *SEC. 5.* Section 6311 is added to the Labor Code, to read:

4 6311. (a) An employer is guilty of a misdemeanor punishable
5 by imprisonment in the county jail for a period not to exceed one
6 year, or by a fine not to exceed one hundred thousand dollars
7 (\$100,000), or both, but if the employer is a corporation or limited
8 liability company, the fine may not exceed one million five
9 hundred thousand dollars (\$1,500,000) if all of the following have
10 occurred:

11 (1) An employer or an agent of the employer knew, through
12 personal observation or by virtue of the fact, by means of either of
13 the following:

14 (A) An employee refused to perform unsafe work.

15 (B) An employee, or his or her labor, legal, or medical
16 representative, reported an unsafe working condition to the
17 employer or an agent of the employer who has management
18 control of the workplace.

19 (2) The employer concealed the unsafe working condition.

20 (3) The unsafe working condition was likely to cause death or
21 serious physical harm.

22 (4) The unsafe working condition did cause death or serious
23 physical harm to an employee.

24 (b) Any employer who willfully refuses to rehire, promote, or
25 otherwise restore an employee or former employee who has been
26 determined to be eligible for rehiring or promotion by a grievance
27 procedure, arbitration, or hearing authorized by law, is guilty of a
28 misdemeanor punishable by imprisonment in the county jail for a
29 period of not exceeding six months or by a fine not to exceed fifty
30 thousand dollars (\$50,000), or both. If the employer is a
31 corporation or limited liability company, the fine is not to exceed
32 two hundred fifty thousand dollars (\$250,000).

33 (c) In determining the amount of the fine to impose under this
34 section, the court shall consider all relevant circumstances,
35 including, but not limited to, the nature, circumstances, extent, and
36 gravity of the violation, any prior history of violations by the
37 employer, the ability of the employer to pay, and any other matter
38 the court determines the interests of justice requires.

39 ~~*SEC. 7.*~~

40 *SEC. 6.* Section 6312 of the Labor Code is amended to read:

1 6312. (a) Any employee who believes that he or she has been
2 subjected to an adverse employment action by any person in
3 violation of Section 6310 may file a complaint with the Labor
4 Commissioner pursuant to Section 98.7 or may pursue a civil
5 action in a court of competent jurisdiction.

6 (b) In order to more effectively protect employees' rights to
7 secure, safe, and healthful working conditions, and to assure
8 effective and enforceable rights in the event of reprisal for
9 involvement with occupational health and safety issues, there shall
10 be established within the Division of Labor Standards
11 Enforcement a unit or personnel designated solely to handle
12 matters pursuant to Sections 6310 to 6312, inclusive.

13 (c) ~~The division~~ *Division of Labor Standards Enforcement*
14 shall file an annual report with the Legislature by December 1 of
15 each year. This report shall provide an accounting of all matters
16 involving Sections 6310 to 6312, inclusive, and shall report
17 statistics so as to coincide with the Federal Occupational Safety
18 and Health Administration fiscal year. The report shall include, but
19 is not limited to, information regarding cases filed, investigated,
20 dismissed, settled, heard, or appealed, the caseload of the ~~division~~
21 *Division of Labor Standards Enforcement*, the timeliness of
22 dispositions, and other information the Legislature may request in
23 advance of the report. The Legislature shall direct the division as
24 to any additional items to include in the report by October 1 of the
25 year the report is due. The Legislature may hold a hearing on the
26 report and obtain additional information after the report is
27 submitted. *It is the intent of the Legislature that any costs to the*
28 *Division of Labor Standards Enforcement that may result from*
29 *additional caseloads due to the enactment of this statute shall be*
30 *paid from grants available under subdivision (g) of Section 672 of*
31 *Title 29 of the United States Code.*

32 ~~SEC. 8.—~~

33 *SEC. 7.* No reimbursement is required by this act pursuant to
34 Section 6 of Article XIII B of the California Constitution because
35 the only costs that may be incurred by a local agency or school
36 district will be incurred because this act creates a new crime or
37 infraction, eliminates a crime or infraction, or changes the penalty
38 for a crime or infraction, within the meaning of Section 17556 of
39 the Government Code, or changes the definition of a crime within

1 the meaning of Section 6 of Article XIII B of the California
2 Constitution.

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